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In the Supreme Court of the United States

OCTOBER TERM, 1994

NORTH STAR STEEL COMPANY, PETITIONER

v.

CHARLES A. THOMAS, ET AL.

CROWN CORK & SEAL CO., INC., PETITIONER

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether civil actions brought under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. 2101 *et seq.*, which contains no statute of limitations, are subject to the most analogous state statute of limitations or to the six-month limitations period for filing an unfair labor practice charge under Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b).

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INTEREST OF THE UNITED STATES

The Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. 2101 *et seq.*, requires covered

employers to give employees or their representatives 60 days' notice of a plant closing or mass layoff. These cases present the question of the appropriate statute of limitations in a civil action brought under the Act. The WARN Act grants the Secretary of Labor authority to "prescribe such regulations as may be necessary to carry out" the Act. 29 U.S.C. 2107(a). The Secretary has promulgated regulations that "establish basic definitions and rules for giving notice" under the Act, 20 C.F.R. 639.1(b), which are part of a coordinated effort to assist dislocated workers. 20 C.F.R. 639.1(f); see 20 C.F.R. Pt. 639. Those regulations implement the purposes and policies of the WARN Act, which are implicated in the determination of an appropriate limitations period. The United States therefore has a substantial interest in the effective enforcement of the WARN Act's prohibitions through the civil actions expressly authorized by that Act, and in the proper resolution of the question presented in these cases.

STATEMENT

1. With exceptions not relevant here, the WARN Act provides that an employer of 100 or more employees "shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order." 29 U.S.C. 2102(a). The Act requires that the notice be served "to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee." 29 U.S.C. 2102(a)(1). Notice must also be given to "the State dislocated worker unit (designated or created under title III of the Job Training Partnership Act [29 U.S.C. 1651 et seq.]," and to "the chief elected official of the unit of local government within which [the] closing or layoff is to occur." 29

U.S.C. 2102(a)(2). The Act identifies those plant closings or mass layoffs for which an employer must give notice according to the number of employees affected, 29 U.S.C. 2101(a)(2) and (3), and defines affected employees as those who "may reasonably be expected to experience" an "employment loss," including termination, a layoff longer than six months, or a greater than 50% reduction in work hours for each of six months. 29 U.S.C. 2101(a)(5) and (6).

The Act provides that "[a]ny employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff." 29 U.S.C. 2104(a)(1). An aggrieved employee may collect "back pay for each day of violation," 29 U.S.C. 2104(a)(1)(A), "up to a maximum of 60 days." 29 U.S.C. 2104(a)(1). An employer who fails to give the requisite notice to an affected unit of local government "shall be subject to a civil penalty of not more than $500 for each day of such violation." 29 U.S.C. 2104(a)(3). An aggrieved employee, his representative, or an aggrieved unit of local government may file a civil action "in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business." 29 U.S.C. 2104(a)(5). The WARN Act does not establish a statute of limitations for the civil actions authorized by Section 2104(a)(5).

2. These consolidated cases involve suits against employers who are alleged to have violated the Act. Respondents in *North Star* are several non-unionized employees. Respondents filed suit against petitioner North Star Steel Company (NS) on October 23, 1992, alleging that North Star had failed to give 60 days' notice before laying off 270 workers at a Pennsylvania plant on

February 25, 1991. NS Pet. App. 17a. On North Star's motion for summary judgment, the district court held that suits brought under the WARN Act are governed by the six-month limitations period for filing an unfair labor practice charge with the National Labor Relations Board (NLRB) under Section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. 160(b). NS Pet. App. 24a. The court therefore dismissed the employees' suit as untimely. *Id.* at 24a-25a. The court rejected respondents' contention that the suit should be governed by the three-year statute of limitations contained in Pennsylvania's Wage Payment and Collection Law. *Id.* at 18a-19a.[1]

In *Crown Cork*, respondent United Steelworkers of America filed suit on October 15, 1992, on behalf of unionized employees. The complaint alleged that petitioner Crown Cork & Seal Company (CC), a national corporation headquartered in Philadelphia, had laid off 85 employees at its Georgia plant on September 30, 1991, without giving 60 days' advance written notice. CC Pet. App. 17a-18a. Relying on the Second Circuit's decision in *United Paperworkers International Union* v. *Specialty Paperboard, Inc.*, 999 F.2d 51 (1993), the

[1] This action by non-union employees followed a successful WARN Act suit brought by the United Steelworkers of America on behalf of unionized employees against North Star arising out of the same layoff. Although the union filed its action more than six months after the layoff, North Star failed to assert a statute-of-limitations defense, and the district court granted summary judgment for the union. See NS Pet. App. 3a. The district court subsequently awarded the union employees back pay for each calendar day of the violation, and the court of appeals affirmed. *United Steelworkers* v. *North Star Steel Co.*, 809 F. Supp. 5 (M.D. Pa. 1992), aff'd in part, vacated in part on other grounds, 5 F.3d 39, 42 (3d Cir. 1993), cert. denied, 114 S. Ct. 1060 (1994).

district court held that "Pennsylvania law provides the appropriate limitations period for civil suits under the WARN Act" and denied Crown Cork's motion for summary judgment. CC Pet. App. 22a, 23a. The court deemed it unnecessary to "determine the particular Pennsylvania statute from which to borrow" because the union's suit was timely under all of the potentially applicable state statutes suggested by the parties. *Id.* at 22a.

3. The court of appeals affirmed the district court's order in *Crown Cork* and reversed the district court's order in *North Star*. NS Pet. App. 1a-16a.[2] The court held that "for actions arising under WARN, courts must apply the most closely analogous state statute of limitations," *id.* at 15a, and it therefore rejected petitioners' contention that the six-month limitations period in Section 10(b) of the NLRA should apply to WARN Act claims, NS Pet. App. 6a-11a.

The court of appeals first noted the general rule that "when a federal statute is silent as to a statute of limitations, the court should apply 'the most closely analogous statute of limitations under state law.'" NS Pet. App. 5a (quoting *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 158 (1983)). The court

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[2] The Third Circuit's decision in the instant cases and the Second Circuit's earlier decision in *United Paperworkers*, *supra*, conflict with subsequent decisions of the Fifth and Sixth Circuits holding that the six-month limitations period of Section 10(b) of the NLRA applies to WARN Act claims. *United Mine Workers* v. *Peabody Coal Co.*, 38 F.3d 850 (6th Cir. 1994), petition for cert. pending, No. 94-1398 (filed Feb. 16, 1995); *Halkias* v. *General Dynamics Corp.*, 31 F.3d 224 (1994), reh'g en banc granted, Nos. 93-1664, 93-1680 & 93-8204 (5th Cir. Sept. 22, 1994). The issue is also pending in the Tenth Circuit. *Frymire* v. *Ampex Corp.*, Nos. 94-1059 & 94-1090 (argued Mar. 6, 1995).

acknowledged that "it is sometimes more appropriate to borrow a limitations period from an analogous area of federal law," but observed that this exception is "closely circumscribed." NS Pet. App. 6a (quoting *Reed* v. *United Transp. Union*, 488 U.S. 319, 324 (1989)). The court explained that the exception should be invoked only "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." NS Pet. App. 6a (quoting *DelCostello*, 462 U.S. at 172). It emphasized that "the mere fact that a statute touches upon issues of labor law does not mean that the Court must resort to the statute of limitations contained in § 10(b) of the NLRA." *Ibid.*

Applying those principles, the court of appeals concluded that a "vast gulf" exists between the policies underlying the NLRA and the WARN Act. NS Pet. App. 7a, 11a. The primary purpose of the NLRA, the court stated, is to protect the right of workers to organize, to bargain collectively for the terms and conditions of their employment, and to ensure that the bargaining process is fair. The NLRA is not, however, concerned with the substantive terms that emerge from collective bargaining. *Id.* at 7a. The NLRA's six-month statute of limitations for charging an unfair labor practice, the court observed, "represents Congress's view of the proper balancing of the various interests involved in the process of collective bargaining." *Ibid.*

By contrast, the court noted, "any effects [the WARN Act] has on collective bargaining are tangential at best. The benefits of WARN accrue not only to unionized workers but to all workers alike." NS Pet. App. 8a. Moreover, by requiring notice to affected units of local

government, and by permitting local governments to collect civil penalties if the requisite notice is not given, "WARN serves a broader purpose as well, that goes beyond the employer-employee relationship addressed by the NLRA." *Id.* at 9a. The court thus distinguished the WARN Act's notice requirement, which confers "an across-the-board substantive right" on all employees and their communities, from the requirement under the NLRA to provide notice of a plant closing to represented workers, which "protect[s] the meaningfulness of the collective-bargaining process." *Id.* at 10a.

The court of appeals rejected petitioners' argument that application of "multiple state statutes of limitations" to WARN Act claims would raise "serious uniformity concerns." NS Pet. App. 12a. Unlike 42 U.S.C. 1983 and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1964, which encompass more complex actions and warrant application of uniform limitations periods, "WARN contains but a single cause of action, and all WARN claims involve nearly identical fact patterns and discrete inquiries." NS Pet. App. 13a. Moreover, the court suggested, the WARN Act's venue provision does not provide an especially broad choice of fora, and the site-based nature of a violation should facilitate the identification of the State in which the violation allegedly occurred. *Ibid.* The court further reasoned that the brief six-month limitations period applicable to the filing of charges with the NLRB under the NLRA could "constitute too great a burden" on WARN Act claimants, whose formal complaints must be filed in federal court. *Id.* at 14a. The court concluded that it "need not decide which state statute applies, since the actions would be timely under any of the possible

statutes of limitations brought to the court's attention." *Id.* at 15a.[3]

SUMMARY OF ARGUMENT

When a federal law provides a cause of action but contains no statute of limitations, this Court's usual practice is to "borrow" a state law limitations period. Petitioners contend that suits under the WARN Act should be governed not by state statutes of limitations, but by the six-month limitations period for bringing an unfair labor practice charge under Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b). That contention should be rejected.

A. Section 10(b)'s comparatively short limitations period reflects Congress's desire for swift resolution of claims implicating the collective bargaining relationship. This Court has stressed in particular the need for expeditious resolution of disputes the outcome of which may affect the continuing relationship between contracting parties. Civil actions under the WARN Act, by contrast, are typically filed after dissolution of the employment relationship. More generally, the NLRA governs the *process* of collective bargaining and private dispute resolution, but does not dictate the substantive terms of the agreement; the WARN Act imposes a substantive obligation that cannot be avoided by agreement of the parties and that augments any similar obligation that the employer has assumed by contract.

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[3] The alleged statutory violation in *Crown Cork* occurred in Georgia, although the suit was filed in Pennsylvania. The court of appeals noted that it "need not decide whether the statute of limitations should be borrowed from Pennsylvania or Georgia law, since no party has brought to the lower courts' attention a statute of limitations, from either state, under which the instant actions would be untimely." NS Pet. App. 14a n.4.

There is consequently no basis for petitioners' attempt to analogize WARN Act suits to unfair labor practice charges under the NLRA.

B. That conclusion is not altered by the fact that some WARN Act violations will also constitute unfair labor practices prohibited by the NLRA. The overlap is far from complete, since the WARN Act applies to unrepresented as well as represented workers and requires more extensive notice than was typically provided to unionized employees before its passage. Moreover, the two Acts serve distinct purposes even with respect to conduct that is governed by both. The WARN Act presumes the termination of the relationship between employer and employees and serves to alleviate the effects of that termination by providing workers time to seek new positions. The NLRA notice requirement, by contrast, serves to facilitate bargaining between the employer and the union regarding the effects of a plant closing.

C. The practicalities of litigation also weigh against application of Section 10(b)'s limitations period to WARN Act claims. Institution of a WARN Act suit will often involve extensive investigation, and will always require the filing of a complaint in court, at a time when the disruptions caused by recent job loss are likely to distract an employee from prosecution of his claim. Application of state law limitations periods, by contrast, will create no extraordinary litigation burdens.

D. Because neither petitioner identifies any potentially applicable state limitations period under which the actions here would be untimely, this Court may affirm the judgment of the court of appeals without deciding which state limitations period is most appropriately applied to WARN Act suits. If this Court chooses to decide that question, however, we believe that

it would be appropriate to apply Pennsylvania's three-year limitations period for actions to recover "unpaid wages or liquidated damages." 43 Pa. Stat. Ann. § 260.9a(g) (1992). Like an award of back pay under the WARN Act, recoveries under that Pennsylvania statute serve both to compensate aggrieved employees for lost wages, and to deter and punish employers' violations of their legal duties.

ARGUMENT

THE STATUTE OF LIMITATIONS FOR WARN ACT CLAIMS SHOULD BE BORROWED FROM THE MOST CLOSELY ANALOGOUS STATE LAW

A. When A Federal Statute Creates An Express Cause Of Action But Establishes No Limitations Period, The Most Closely Analogous State Statute Of Limitations Is Presumptively Applicable

Like many federal statutes, the WARN Act provides a cause of action for violations but contains no express statute of limitations. "In such situations [the Court does] not ordinarily assume that Congress intended that there be no time limit on actions at all; rather, [its] task is to 'borrow' the most suitable statute or other rule of timeliness from some other source." *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 158 (1983). This Court's decisions recognize a "general rule that statutes of limitations are to be borrowed from state law." *Reed* v. *United Transp. Union*, 488 U.S. 319, 324 (1989); accord *DelCostello*, 462 U.S. at 158 ("We have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law."). "Given [the Court's] longstanding practice of borrowing state law, and the congressional awareness of this practice, [the Court] can

generally assume that Congress intends by its silence that [the Court] borrow state law." *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 147 (1987).[4]

Petitioners contend that suits under the WARN Act should be governed not by state limitations periods, but by the six-month limitations period for filing an unfair labor practice charge under Section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. 160(b). Petitioners place principal reliance on *DelCostello*, in which this Court held that the Section 10(b) limitations period applied to a "hybrid" suit by employees against both their employer and their union for breaches of the collective bargaining agreement (under Section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. 185) and of the duty of fair representation. See 462 U.S.

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[4] This Court's earlier decisions applied state statutes of limitations to federal claims as a matter of state law, unless Congress expressly provided otherwise. *International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 703-704 (1966); see *Campbell* v. *Haverhill*, 155 U.S. 610, 614-616 (1895); *McCluny* v. *Silliman*, 28 U.S. (3 Pet.) 270, 277-278 (1830); *Agency Holding*, 483 U.S. at 159-162 (Scalia, J., concurring in the judgment). In more recent decisions the Court has continued to hold that state limitations periods apply to federal actions, but on the slightly different theory that Congress's failure to provide a limitations period constitutes an implicit federal directive to "borrow" the state law limitations period for federal claims. *Agency Holding*, 483 U.S. at 158, 164 (Scalia, J., concurring in the judgment); see *Hoosier Cardinal*, 383 U.S. at 706; *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946) ("As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation."). The result remains, however, that state limitations periods presumptively govern the timeliness of federal claims. See *Hoosier Cardinal*, 383 U.S. at 704.

at 154-155.[5] In our view, *DelCostello* provides scant support for petitioners' position.

The Court in *DelCostello* expressly gave its holding a narrow scope, stressing that the decision "should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere." 462 U.S. at 171. The Court reaffirmed that principle in *Reed*, holding that state limitations periods should apply to a union member's claim, under Section 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 411(a)(2), that a union had violated his right to

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[5] Petitioner North Star also contends (NS Br. 32-37) that the Court should abandon its practice of borrowing state limitations periods in light of the recent passage of a residual federal statute of limitations. See 28 U.S.C. 1658 (Supp. V 1993) ("Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."). That argument is without merit. Section 1658 applies by its terms only to claims arising under federal statutes "enacted after the date of the enactment of" that section (December 1, 1990), and it therefore "has no application in the present litigation." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 364 n.10 (1991). Congress's refusal to make Section 1658 applicable to actions brought under previously enacted laws indicates its intent that existing legal standards be applied to such statutes. Cf. *Agency Holding*, 483 U.S. at 147. Even if it were relevant to the instant cases, moreover, Section 1658 does not reflect a policy judgment that the most analogous federal limitations period should be "borrowed." It reflects instead Congress's decision that a relatively long (four-year) limitations period should apply unless Congress has expressly enacted a different one. Section 1658 therefore could hardly support petitioners' argument that the suits at issue here, which were filed less than two years after respondents' causes of action accrued, should be dismissed as untimely.

free speech regarding union matters. 488 U.S. at 323. The Court declined to apply the NLRA's six-month limitations period, reiterating that, "'in labor law or elsewhere,' application of a federal statute will be unusual, and 'resort to state law remains the norm for borrowing of limitations periods.'" *Id.* at 324 (quoting *DelCostello*, 462 U.S. at 171). The Court noted that it "decline[s] to borrow a state statute of limitations only 'when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.'" 488 U.S. at 324 (quoting *DelCostello*, 462 U.S. at 172). *Reed* thus makes clear that the presumption in favor of state-law borrowing survives *DelCostello*, and that it applies with full force to federal labor statutes.[6]

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[6] This Court's subsequent decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), casts no doubt on the continuing vitality of those principles. The Court in *Lampf* faced "the awkward task" of determining the appropriate statute of limitations for a cause of action implied under a federal statute. *Id.* at 359. The Court "conclude[d] that where * * * the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations period. We can imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections." *Ibid.*

Lampf is inapposite here for two reasons. First, the WARN Act provides an *express* right of action. 29 U.S.C. 2104(a)(5). Congress's silence regarding the appropriate limitations period thus suggests congressional acquiescence in this Court's "longstanding practice of borrowing state law," *Agency Holding*, 483 U.S. at 147—an inference that would not be legitimate where

For the reasons that follow, unfair labor practice charges filed with the NLRB under the NLRA furnish a distinctly inapt analogy for suits brought in court under the WARN Act. Application of Section 10(b)'s six-month limitations period in the instant cases is therefore unwarranted.

B. The NLRA Protects The Process Of Collective Bargaining And Private Dispute Resolution, While The WARN Act Confers Substantive Rights Separate And Distinct From The Collective Bargaining Process

1. The purpose of the NLRA is to achieve industrial peace by protecting the rights of workers to organize and to bargain collectively over the terms and conditions of their employment. See 29 U.S.C. 151; 29 U.S.C. 141(b) (Labor Management Relations Act, 1947); *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 674 (1981). To that end, the NLRA focuses on "the formation of the collective agreement and the private settlement of disputes under it" through the grievance and arbitration system. *International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 702 (1966). Section 10(b) was tailored to effectuate those goals. It provides that the General Counsel shall not issue a complaint "based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. 160(b); see 29 U.S.C. 153(d) (functions of General Counsel). In providing for the swift disposition of disputes, "Congress established a limitations period

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the cause of action itself is implied. See *Lampf*, 501 U.S. at 365 (Scalia, J., concurring in part and concurring in the judgment). Second, petitioners in this case do not argue that the limitations period for civil actions under Section 2104(a)(5) should be drawn from some other provision in the WARN Act; they contend instead that the Court should adopt the limitations provision of a different federal statute enacted more than 40 years earlier.

attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system."–*DelCostello*, 462 U.S. at 171 (quoting *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 70 (1981) (Stewart, J., concurring in the judgment)).

Explaining its decision to apply the NLRA's six-month limitations period to hybrid Section 301/duty-of-fair-representation suits, the *DelCostello* Court stressed the importance of speedy resolution of disputes concerning the collective bargaining process, observing that

> the grievance and arbitration procedure often processes disputes involving interpretation of critical terms in the collective-bargaining agreement affecting the entire relationship between company and union. This system, with its heavy emphasis on grievance, arbitration, and the law of the shop, could easily become unworkable if a decision which has given meaning and content to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as three years later.

462 U.S. at 169 (quoting *United Parcel Serv.*, 451 U.S. at 64 (brackets, ellipsis, and internal quotation marks omitted). The Court thus recognized that application of the NLRA's comparatively short limitations period to hybrid Section 301/duty-of-fair-representation suits is justified, in substantial measure, by the fact that adjudication of such actions (like the NLRB's investigation and prosecution of unfair labor practice charges) frequently involves resolution of disputes whose outcome may affect the *continuing* relationship

between contracting parties.[7] The smooth functioning of that relationship obviously depends upon expeditious resolution of any disputes that may arise. Civil actions under the WARN Act, by contrast, are typically filed *after* the dissolution of the employment relationship, and a central justification for the unusually short limitations period established by Section 10(b) of the NLRA is consequently inapplicable.

2. More generally, a claim under the WARN Act neither resembles an unfair labor practice charge nor directly implicates the "federal interests in stable bargaining relationships and in private dispute resolution" between represented workers and employers that the six-month limitations period of Section 10(b) accommodates. *Reed*, 488 U.S. at 333.[8] The NLRA is

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[7] As this Court observed in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960), "[t]he processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement"; "[t]he grievance procedure is, in other words, a part of the continuous collective bargaining process." The arbitrator's resolution of a grievance thus does more than terminate a particular dispute. It serves as well to shape the contracting parties' understanding as to the parameters of their agreement, and forms part of the backdrop to their subsequent negotiations. Given the influence of arbitral decisions upon subsequent interaction between the parties, speedy resolution of any challenges to those decisions is essential.

[8] In *Reed*, the Court explained that in *DelCostello* "[t]he specific focus of our comparison between unfair labor practice charges governed by § 10(b) and hybrid § 301/fair representation claims was their effects upon the formation and operation of the collective-bargaining agreement between the employer and the bargaining representative, and upon the private settlement of disputes under that agreement through grievance-and-arbitration procedures." 488 U.S. at 329. This Court in *Reed* deemed the interests in stable bargaining relationships and private dispute

"concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 753 (1985); accord *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 20 (1987). The WARN Act, by contrast, imposes a substantive obligation that cannot be avoided by agreement of the parties[9] and that augments any similar obligation that the employer has assumed by contract.[10] Moreover, the

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resolution implicated in only a "tangential and contingent" fashion (488 U.S. at 328) by free speech claims brought by a union member under Title I of the LMRDA, 29 U.S.C. 411(a)(2). Because the LMRDA is concerned with internal union affairs, it was "not directly related in any way to collective bargaining or dispute settlement under a collective-bargaining agreement." *Reed*, 488 U.S. at 330. The Court contrasted an LMRDA suit to "hybrid" Section 301/duty-of-fair-representation claims, "which directly challenge both the employer's adherence to the collective-bargaining agreement and the union's representation of the employee in grievance-and-arbitration procedures." *Id.* at 331. Accordingly, the Court analogized the LMRDA action to a state personal injury claim and refused to apply the six-month limitations period of Section 10(b).

[9] See 20 C.F.R. 639.1(g) ("[c]ollective bargaining agreements" may "clarify or amplify the terms and conditions of WARN, but may not reduce WARN rights").

[10] An employer's WARN Act liability may be offset by "any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation." 29 U.S.C. 2104(a)(2)(B). The legislative history indicates that this language was fashioned to ensure that severance payments made pursuant to a collective bargaining agreement could not be deducted in determining the employer's WARN Act liability. Cf. 134 Cong. Rec. 15,928 (1988) (Sen. Metzenbaum) (opposing proposed amendment on the ground that "the employees may already be entitled to severance pay and benefits under a collective bargaining agree-

WARN Act's provision for civil penalty actions by affected units of local governments has no analogue in the NLRA.

In short, the WARN Act "implements a federal policy * * * that simply had no part in the design of a statute of limitations for unfair labor practice charges." *Reed*, 488 U.S. at 332. The WARN Act thus resembles the state "minimum substantive labor standard[]" at issue in *Fort Halifax*, 482 U.S. at 20, which this Court held not to be preempted by the NLRA because it "does not intrude upon the collective-bargaining process." *Id.* at 6-7. The Maine law in *Fort Halifax* required certain employers that closed or relocated their businesses to make severance payments according to a statutory formula; it authorized affected employees, or a state official in their stead, to sue a noncomplying employer to recover the severance pay. *Id.* at 5. Like the Maine law, the WARN Act protects "individual union and nonunion workers alike, and thus 'neither encourage[s] nor discourage[s] the collective-bargaining processes that are the subject of the NLRA.'" *Id.* at 21 (quoting *Metropolitan Life*, 471 U.S. at 755). Absent an effect on collective bargaining, it would therefore be inappropriate to subject WARN Act claims to the NLRA's six-month limitations period. See *United Paperworkers International Union* v. *Specialty Paperboard, Inc.*, 999 F.2d 51, 54 (2d Cir. 1993).[11]

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ment[.] * * * The [proposed] amendment would allow employers who already owe severance pay to escape the notice requirement simply by paying the severance they already owed. * * * [T]hat is unfair."). See also 29 U.S.C. 2105 (WARN Act rights are "in addition to, and not in lieu of, any other contractual or statutory rights or remedies of the employees").

[11] In *International Union* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), the Court applied a state limitations period to a union's

3. Petitioners also emphasize (NS Br. 19; CC Br. 12-15) that where employees are represented by a union, Section 8(a)(5) of the NLRA, 29 U.S.C. 158(a)(5), requires an employer to bargain over the effects of a decision to shut down part of its business. See *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981). Because such bargaining "must be conducted in a meaningful manner and at a meaningful time," *id.* at 682, an employer's failure to give adequate notice of its intention to close a plant will sometimes constitute an unfair labor practice. Petitioners argue that this overlap between the prohibitions of the NLRA and the WARN Act suggests a congruence of purpose that justifies application of the Section 10(b) limitations period to WARN Act suits. That argument is without merit.

First, it is hardly the case that every violation of the WARN Act will also constitute an unfair labor practice

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suit under Section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. 185, for breach of a collective bargaining agreement by an employer. Discussing that prior decision, the Court in *DelCostello* stressed the distinction between a "straightforward breach-of-contract suit under § 301," like *Hoosier Cardinal*, and a hybrid Section 301/duty-of-fair-representation claim, "amounting to a direct challenge to the private settlement of disputes under the collective-bargaining agreement." 462 U.S. at 165 (brackets and internal quotation marks omitted). The Court in *DelCostello* thus made clear that suits implicating private resolution of disputes affecting the collective bargaining process raise concerns distinct from other actions grounded in federal labor law. See also *id.* at 162-163 ("national uniformity is of less importance when the case does not involve 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it' ") (quoting *Hoosier Cardinal*, 383 U.S. at 702).

prohibited by the NLRA. Unlike Section 8(a)(5) of the NLRA, 29 U.S.C. 158(a)(5), which requires the employer "to bargain collectively with the representatives of his employees" regarding the effects of a plant closing, the WARN Act confers a right to notice of an impending plant closing upon represented and unrepresented workers alike, as well as upon enumerated governmental entities. Prior to the WARN Act's passage, moreover, unionized workers received an average of only 14 days' advance notice before a plant closing or mass layoff. See S. Rep. No. 62, 100th Cong., 1st Sess. 13 (1987). By mandating 60 days' notice for all workers, Congress clearly intended to supplement existing rights under the NLRA.

Second (and more fundamentally), the WARN Act and the NLRA serve distinct purposes even with respect to conduct that is governed by both.[12] The purpose of the WARN Act's notice requirement is to protect "workers, their families and communities" by providing "transition time to adjust to the prospective loss of employment," to seek other jobs, and to obtain "skill training or retraining" to "compete in the job market." 20 C.F.R. 639.1(a). Congress tailored the provisions of the WARN Act to effectuate those purposes. It mandated a minimum of 60 days' advance notice to enable dislocated employees to adjust their finances to the impending job loss and afford them an early opportunity to begin a

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[12] In *Reed*, this Court held that the Section 10(b) limitations period should not be applied to claims under Title I of the LMRDA even if it were assumed that the alleged Title I violations would also constitute unfair labor practices and breaches of the duty of fair representation. 488 U.S. at 333 n.7. The Court explained that any such "overlap * * * would not be attributable to similar federal policies underlying each of these areas of protection, for the policies behind [the relevant prohibitions] are quite different." *Ibid.*

job search. See S. Rep. No. 62, *supra*, at 9, 10-11. In addition, Congress mandated that employers simultaneously give notice to designated local and state officials to enable them to provide job counseling, evaluation, and training services at the worksite before employees have dispersed; the statutory goal is to speed the reintegration of dislocated employees into the work force, while reducing the broader social costs of unemployment insurance, welfare services, and a diminished local economy. *Id.* at 5, 10-12. The purpose of the NLRA's notice-of-plant-closing requirement, by contrast, is to facilitate collective bargaining between the employer and the union regarding the effects of the plant closing.[13] Because "[t]he purpose of WARN, unlike that of the NLRA, is not to ensure labor peace but to alleviate the distress associated with job loss for both the workers and the community in which they live," *United Paperworkers*, 999 F.2d at 54, application of the Section 10(b) limitations period is inappropriate.[14]

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[13] In a recent decision, the NLRB similarly emphasized the distinction between WARN Act and NLRA rights. The Board ruled that payments required by the WARN Act may not be credited against payments required to remedy a violation of Section 8(a)(5) of the NLRA. It noted that "WARN payments remedy the Respondent's violation of its obligations to give advance notice of its decision to cease operations. The [NLRA] payments remedy the Respondent's violation of its obligations to allow for meaningful bargaining over the effects of its decision to cease operations." *Times Herald Printing Co.*, No. 16-CA-15433, 1994 NLRB LEXIS 972, at *12 (NLRB Nov. 30, 1994).

[14] Petitioner Crown Cork relies (CC Br. 15-17) upon the similarities between the WARN Act's precursors and the NLRA requirement to engage in collective bargaining over the effects of plant closings and layoffs. Petitioner acknowledges, however, that the predecessor bills "would have required employers not only to notify but also to consult with employees or their exclusive

C. The Practicalities Of Litigation Weigh Against Application Of The NLRA's Limitations Period To WARN Act Claims

The practicalities of litigation also militate against application of Section 10(b)'s limitations period to WARN Act claims. The NLRA's six-month limitations period would create significant problems in the litigation of such claims, thwarting the remedial purpose of the Act. On the other hand, application of state limitations periods should present no unusual problems for WARN Act litigants.

In determining which statute of limitations to apply, this Court has considered whether the limitations period affords sufficient time to vindicate effectively the right protected, particularly when the occurrence of the violation may be difficult to detect and the assistance of counsel will be needed to frame and file a suit. See, *e.g.*, *Agency Holding*, 483 U.S. at 154 ("unduly short state statutes of limitations * * * thwart the legislative purpose of creating an effective remedy"); *Reed*, 488 U.S. at 327 (selecting personal injury statute that generally affords a one-year limitations period rather than Section 10(b)); *DelCostello*, 462 U.S. at 165-166 (rejecting 90-day state limit in favor of Section 10(b)'s six-month limit where unsophisticated employee will need to evaluate union's representation and retain counsel); *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 368-369 (1977); *Hoosier Cardinal*, 383 U.S. at 707 n.9; *Campbell* v. *Haverhill*, 155 U.S. 610, 615 (1895).

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representative before closing a plant." *Id.* at 16. In our view, the elimination of consultation requirements from the WARN Act as passed reinforces the inference that the notice required by the Act serves a purpose different from that served by the notice required by the NLRA. Under the WARN Act, the opportunity to negotiate with the employer is simply an incident of the notice afforded, not its primary purpose. See pages 20-21, *supra*.

Section 10(b)'s six-month limitations period is too short to vindicate WARN Act rights effectively because a violation of the WARN Act may often be difficult to ascertain. Determining whether a "plant closing" has occurred requires knowledge of the number of original employees and the number of part-time employees as defined by their hours of work. 29 U.S.C. 2101(a)(1), (2) and (8). Identifying a "mass layoff" requires knowledge of the number and percentage of employees laid off over any 30-day or 90-day period, taking into account employees who have been offered a transfer. 29 U.S.C. 2101(a)(3), 2101(b)(2), 2102(d). Assessing the merit of a WARN Act claim also requires potential litigants to determine whether any of the exemptions from and reductions in the Act's 60-day notice period, see 29 U.S.C. 2102(b), 2103, are applicable to their cases. Even assuming that unions could acquire and evaluate the information necessary to substantiate a violation of the Act, unrepresented claimants will frequently be unable to do so. Finally, a WARN Act claimant who suspects a violation will need to retain an attorney to evaluate the case and file a complaint in federal district court, subject to the strictures of Fed. R. Civ. P. 11(b)(3).[15] The ur-

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[15] As the Second Circuit has recognized, see *United Paperworkers*, 999 F.2d at 55, the requirement that a WARN Act claim be filed in federal district court weighs against the application of Section 10(b)'s six-month limitations period. Under the NLRA, the claimant's duty is limited to the filing of a charge with the NLRB, which determines whether a complaint should be issued and bears responsibility for prosecuting the case. *Ibid.* Thus, "[t]he burden on [NLRA] complainants in pursuing a claim is minimal, justifying the short statute of limitations." *Ibid.* The statutes cited by petitioners (NS Br. 28; CC Br. 27-28) for the proposition that federal employment laws typically contain short limitations periods similarly provide for enforcement by

gency of finding a new job, and the participation in the very services for dislocated workers that the Act promotes, see 29 U.S.C. 2102(a)(2) (mandating notice to state dislocated workers unit and local government), may distract aggrieved employees from immediate pursuit of a possible WARN Act claim. The six-month limitations period of Section 10(b), suited to the filing of an administrative charge with the NLRB, often will not permit the effective exercise of WARN Act rights in a judicial forum.

Petitioners also contend that a short limitations period is necessary in order (1) to further the WARN Act's purpose to provide prompt assistance to displaced workers (NS Br. 30-31; CC Br. 25-26), and (2) to protect employers from the burden of litigating stale claims (NS Br. 31-32; CC Br. 26-27). As to the former point: The WARN Act requires that *notice* of an impending plant closing or mass layoff be provided in a timely fashion in order to ensure prompt assistance to displaced workers; effectuation of that purpose does not depend on adoption of the Section 10(b) limitations period for the filing of a suit after the closing or layoff has already occurred.

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administrative bodies. By contrast, federal labor statutes that require the commencement of actions by the filing of a complaint in court typically provide longer limitations periods. See, *e.g.*, Portal-to-Portal Act of 1947, 29 U.S.C. 255(a) (two-year limitations period, or three years for willful violation, for Fair Labor Standards Act of 1938, Walsh-Healey Act, or Bacon-Davis Act); Employee Retirement Income Security Act of 1974, 29 U.S.C. 1113 (for breach of fiduciary duty, suit may be filed within six years after violation or three years after actual knowledge of the breach); Employee Polygraph Protection Act of 1988, 29 U.S.C. 2005(c)(2) (three-year limitations period); Family and Medical Leave Act of 1993, 29 U.S.C. 2617(c)(1)-(2) (Supp. V 1993) (two-year limitations period or three years for willful violation).

Moreover, adoption of a longer limitations period drawn from state law will not prevent employees or their representatives from filing suit within six months, and it is bizarre in any event to suggest that adoption of the shorter Section 10(b) period will further the interests of potential plaintiffs. As to the latter: Concern for the possibility of stale claims could serve to rebut the presumption in favor of state-law borrowing only if the likelihood that relevant evidence will become unavailable were *especially* great in the WARN Act context. In fact, quite the contrary is true. Because resolution of a WARN Act suit will generally turn on documentary evidence rather than on testimony based upon personal recollection, accurate disposition of litigation brought under the Act is particularly *un*likely to be impaired by the passage of time.[16]

Finally, application of state limitations periods to WARN Act claims creates no extraordinary risk of forum shopping. First, it is unclear whether a federal court would borrow the statute of limitations from the law of the forum State or that of the State in which the violation occurred. Compare NS Pet. App. 14a n.4 and *Halkias* v. *General Dynamics Corp.*, 31 F.3d 224, 236-237 (1994) (suggesting forum State), reh'g en banc granted, Nos. 93-1664, 93-1680 & 93-8204 (5th Cir. Sept. 22, 1994) with *United Paperworkers*, 999 F.2d at 56 & n.9 and *Halkias*, 31 F.3d at 247 (Wisdom, J., dissenting)

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[16] As petitioner North Star acknowledges (NS Br. 32 n.15), federal law requires the preservation of employment records for a three-year period. See 29 C.F.R. 516.5; 29 C.F.R. 1627.3(a). Of course, nothing prevents a prudent employer from maintaining such records for a longer period. Maintenance of the evidence needed to defend against a WARN Act suit is thus entirely within a potential defendant's control.

(suggesting State of violation).[17] If the statute of limitations is drawn from the law of the State of violation, of course, then there is no advantage to forum shopping. Even if the limitations period of the forum State applies, venue options are not unusually expansive under the WARN Act.[18] Such claims are not inherently multistate in nature; there will usually be only a single site of violation, and thus no choices available in that regard. Also, the option of suing where the employer transacts business is actually narrower than the generally applicable venue provisions in 28 U.S.C. 1391(c), which permits suit against a corporation "in any judicial district in which it is subject to personal jurisdiction." See D. Siegel, *Commentary on 1988 and 1990 Revisions of Section 1391*, 28 U.S.C.A. 1391, at 17-19 (current venue statute permits suit not only where the corporation is doing business, but also in any district in which a state long-arm statute would permit out-of-state service). Thus, forum shopping under the WARN Act would be no more problematic than under other federal statutes in which state statutes of limitations are borrowed and where venue is governed by 28 U.S.C. 1391(c). See *Halkias*, 31 F.3d at 247 (Wisdom, J., dissenting).

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[17] Even if the district court applies the law of the forum State, that law may include a state borrowing statute mandating application of the limitations period of the State where the cause of action arose. See *Cope* v. *Anderson*, 331 U.S. 461, 464-468 (1947).

[18] Suits under the WARN Act may be brought in any district in which the violation is alleged to have occurred or in which the employer transacts business. 29 U.S.C. 2104(a)(5).

D. Pennsylvania's Three-Year Limitations Period For Actions To Recover "Unpaid Wages Or Liquidated Damages" Provides The Most Appropriate State Law Analogue For WARN Act Claims

The court of appeals concluded that it "need not decide which state statute applies, since the actions would be timely under any of the possible statutes of limitations brought to the court's attention." NS Pet. App. 15a. In this Court as well, neither petitioner identifies any potentially applicable state limitations period under which the actions here would be untimely. This Court therefore may affirm the judgment of the court of appeals without deciding which state limitations period is most appropriate.

If the Court chooses to resolve the question, however, we believe that it would be appropriate to apply Pennsylvania's three-year limitations period for actions to recover "unpaid wages or liquidated damages." 43 Pa. Stat. Ann. § 260.9a(g) (1992).[19] An employee's remedy for

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[19] As noted above, see note 3, *supra*, the alleged statutory violation in *Crown Cork* occurred in Georgia, although suit was filed in Pennsylvania. Because petitioner Crown Cork has not contended that the district court should have borrowed a limitations period from Georgia law, we have confined our analysis to the law of Pennsylvania.

Petitioner North Star observes that, "[g]iven the obvious similarities in WARN litigation, there exists no suggestion in any reported case or comment that the limitations period for WARN should vary based upon the factual issues presented in each case." NS Br. 13 n.4. We agree that the appropriate characterization of a WARN Act suit does not depend upon the facts of a particular case. It does not follow, however, that WARN Act suits in States other than Pennsylvania would inevitably be governed by the state statute of limitations applicable to suits for unpaid wages. Application of a different limitations period might be warranted, either because the law of that State furnished an even more precise

a WARN Act violation is "back pay for each day of violation," 29 U.S.C. 2104(a)(1)(A), measured by reference to the employee's "regular rate," 29 U.S.C. 2104(a)(1)(A)(i) and (ii). The Act thus serves in part to compensate aggrieved employees for the wages they would have earned had the plant remained in operation for the requisite 60 days after the employer gave notice of its impending closure.

The "back pay" remedy available under the WARN Act serves substantial noncompensatory purposes as well. The Act provides that the amount of back pay for which a noncomplying employer is liable shall be reduced by "any wages paid by the employer to the employee for the period of the violation." 29 U.S.C. 2104(a)(2)(A). The Conference Report makes clear that "the only payments that may offset the back pay remedy are those made by the violating employer. Wages received from another employer, or unemployment compensation payments received from the State, may not be used to offset the remedy." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1053 (1988). The absence of an offset for wages earned from another employer makes clear that Congress intended to deter and penalize violations of the Act, and to ensure that employees have the security of continuing their existing employment for each day of the 60-day notice period, rather than simply to provide aggrieved employees with the wages they would have earned had no violation occurred.[20] Those punitive and deterrent

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analogue, or because the limitations period governing wage payment suits was so short as to frustrate effective enforcement of the WARN Act.

[20] In contrast to the WARN Act remedy, back pay typically is intended to place an aggrieved employee in the same position he would have occupied but for the employer's unlawful action, and

purposes, however, also inform Pennsylvania's wage payment law, which provides for "liquidated damages [in] an amount equal to twenty-five percent (25%) of the total amount of wages due, or five hundred dollars ($500), whichever is greater," as a remedy for bad-faith refusal to pay wages owed. 43 Pa. Stat. Ann. § 260.10 (1992). Compare S. Rep. No. 62, *supra*, at 24 (WARN Act back pay remedy "is in effect a liquidated damages provision[], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings").[21] The three-year limitations period specified by 43 Pa. Stat. Ann. § 260.9a(g) (1992), which applies to actions "for the collection of unpaid wages or liquidated damages," therefore appears to us to furnish an appropriate analogue for an employee's WARN Act claim.

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thus ordinarily includes an offset for wages earned from another employer. See, *e.g.*, *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197-198 (1941) (NLRA); *United States* v. *Burke*, 112 S. Ct. 1867, 1873-1874 (1992) (Title VII of the Civil Rights Act of 1964).

[21] The Senate Report accompanied a predecessor version of the Act. That version included the "back pay for each day of violation" and "regular rate" formulations, but its treatment of fringe benefits differed somewhat from the Act as later passed. See S. Rep. No. 62, *supra*, at 68.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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